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### **SUPREME COURT DECLINES TO SEND CHAGOS ISLANDERS' CASE FOR RECONSIDERATION DESPITE ADMISSIBLE US-UK DIPLOMATIC CABLES**

*R (Bancoult) v Foreign Secretary* [2018] UKSC 3

#### **Introduction**

By a decision handed down on 8 February 2018 in *R (Bancoult) v Foreign Secretary* [2018] UKSC 3, a long-running dispute arising out of the British Government's removal of the Chagos Islanders in 1971-1973 and creation of a Marine Protected Area ("MPA") in the British Indian Ocean Territory ("BIOT"), the UK Supreme Court held that documents which had previously been part of the archive of a diplomatic mission but had ceased to be so and had become widely disseminated in public could no longer sensibly attract the "inviolability" generally afforded to diplomatic communications in international law. Furthermore, the Supreme Court upheld the lower court's conclusions regarding whether the UK Foreign Secretary had had an improper motive in the creation of the MPA and held that an alleged non-disclosure by the British Government during public consultations on the MPA did not require the consultation process and resulting decision to be set aside for unfairness.

#### **Background**

In 2010, the then UK Foreign Secretary created the MPA following a public consultation. The MPA prohibited fishing in the BIOT, causing an end to commercial fishing by the Chagos Islanders in those waters. The Chagos Islanders asserted that the British Government had failed to disclose during the consultation that it was arguable that Mauritius had fishing rights in the BIOT territorial waters. A document purporting to be an electronic cable sent by the US Embassy in London to the US Government recording a 2009 meeting between British and US officials was made publically available by the Wikileaks website that proved, according to the Chagos Islanders, that the MPA had been created by the UK Foreign Secretary with the "improper motive" of preventing any resettlement in the Chagos Islands.

At first instance, the Divisional Court considered that the cable was inadmissible as evidence on the grounds that it benefitted from the "inviolability" of the documents of a diplomatic mission under the Vienna Convention on Diplomatic Relations 1961 ("VCDR 1961"). On that basis, the Divisional Court restricted the Chagos Islanders' counsel's cross-examination of British Government officials. The Divisional Court held that the UK Foreign Secretary had

not had any improper motive for the creation of the MPA. On appeal, the Court of Appeal took the view that the Divisional Court had been wrong to find the cable inadmissible – however, the cable’s admission into evidence would not, in the circumstances, have affected the Divisional Court’s conclusions as to “improper motive”.

The Chagos Islanders appealed to the Supreme Court.

## **Decision**

The Supreme Court (Lord Neuberger; Lady Hale; Lord Mance; Lord Kerr; Lord Clarke; Lord Sumption; Lord Reed) affirmed that the relevant cable was not “inviolable” and was admissible as evidence, but ultimately upheld (by majority) the conclusions regarding “improper motive”. Further, the Supreme Court rejected the appeal on the issue of alleged non-disclosure of Mauritian fishing rights.

Regarding the admissibility of the cable, Lord Mance held that Articles 24 and 27(2) VCDR 1961 provided that, in principle, a diplomatic mission’s archival documents benefitted from an “inviolability” which, in the absence of “extraordinary circumstances”, rendered any use of those documents in the host country’s courts impermissible. However, there were two qualifications to that principle: (1) the relevant document had to be a part of (or remain part of) the diplomatic mission archive; (2) the contents of the relevant document must not have become so widely publically disseminated as to destroy any confidentiality or “inviolability” that could sensibly be attached to it. In this case, it was not suggested that the cable emanated from the US embassy in London. At the moment it reached the US State Department, it became a document in the custody of the US Government, but was not part of the archive of the US diplomatic mission in London. On that basis, the Supreme Court held that the cable was not “inviolable”. It was possible for a diplomatic mission’s archival document to lose its “inviolability” as a result of dissemination in the public domain, notwithstanding that its extraction from the archive was wrongful. In the instant case, the entry into the public domain was the responsibility of parties other than the Chagos Islanders. In those circumstances, not only was the cable no longer inviolable but it was also admissible as evidence.

Lord Sumption emphasised that whether a document belonged to a diplomatic mission’s archives (as distinct from belonging to another organ of the sending State) depended upon whether it was ‘controlled’ by personnel of that particular mission rather than other agents of the sending State. In that regard, the origin and content of the document was not relevant. Lady Hale considered that it could not be the case that a diplomatic communication lost its inviolability when it left the mission. Lord Sumption’s concept of ‘control’ was required to include any restrictions on dissemination imposed by the diplomatic mission on the communication.

A majority of the Supreme Court held that the Court of Appeal had not erred in its finding as regards improper motive for the UK Foreign Secretary’s creation of the MPA. What the Court of Appeal had been required to consider was whether the admission of the relevant cable could have led the Divisional Court to a different conclusion on the “improper motive” issue. The Court of Appeal had held that the relevant cable’s admission “would” not have

made a difference. That was “shorthand” for a conclusion that there was no realistic possibility that the Divisional Court’s findings would have been affected. In the circumstances, the Divisional Court had conducted a full review of the creation, development and announcement of the MPA and had, in fact, heard evidence from Foreign Office employees on important aspects of the relevant cable. The Chagos Islanders had not demonstrated that the Court of Appeal was wrong in concluding that cross-examination of Foreign Office officials on the cable would have resulted in a different outcome.

Lord Kerr and Lady Hale dissented on this point. Lord Kerr noted that whilst “*it is true that there was extensive cross examination ... based on the contents of the cable ... the difference between probing witnesses’ accounts and confronting them with admissible evidence which flatly contradicts their accounts should not be underestimated*”. Lord Kerr considered that the Court of Appeal ought to have recognised the “*substantial possibility*” that the Divisional Court would have taken a different view of the evidence had the cable been admitted and, further, that the Foreign Secretary’s decision could be impugned as having been “*taken on a misapprehension of the true facts and circumstances*”.

As regards the alleged failure of the British Government to disclose the possibility of Mauritius’ fishing rights during the consultation, the Supreme Court noted that it appeared that the Tribunal in *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* had affirmed the existence of the Mauritian fishing rights in BIOT territorial waters. However, the Supreme Court concluded that a failure to mention that evidence had not undermined the consultation nor provided any justification for the consultation to be set aside. There was no reason to believe that the decision post-consultation would or could have been different had attention been drawn to the possible existence of Mauritian fishing rights.

### **Concluding Remarks**

Despite the Supreme Court’s finding that the diplomatic cable made publically available was not inviolable and was admissible, the case was not sent back to the Divisional Court for reconsideration.

The removal of the Chagos Islanders from their home islands has generated substantial international litigation and arbitration. In June 2017, the UN General Assembly requested an advisory opinion from the International Court of Justice on the international law consequences of the separation of the Chagos archipelago from Mauritius in 1965.